STATE OF MICHIGAN

COURT OF APPEALS

GREAT LAKES TOWING COMPANY,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED
January 16, 2007

No. 271556
Court of Claims
LC No. 04-000152-MT

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

In this action involving the Use Tax Act (UTA), MCL 205.91 *et seq.*, plaintiff appeals as of right a court of claims order granting defendant summary disposition pursuant to MCR 2.116(I)(2). We affirm.

Plaintiff is an out-of-state corporation that provides tugboat services to vessels of 500 tons or more on Great Lakes waters. Its tugboats all weigh less than 500 tons. In providing these services, plaintiff's tugboats are physically attached to serviced vessels by means of a tow cable. Plaintiff operates in and around Detroit, Sault Ste. Marie, Ludington, Saginaw, Port Huron, Port Inland, and Ferrysburg. Its tugboats berth at various ports around the Great Lakes, including a port in Detroit.

Defendant conducted a use tax audit of plaintiff's operation for the period of July 1, 1997, through September 30, 2000, and assessed plaintiff a use tax deficiency of $15,235 plus interest, caused by its "failure to accrue use tax on materials used in repairs, fuel and capital assets" in the operation of its tugboats.[1] Plaintiff paid the assessment under protest and brought the present action before the court of claims seeking a refund of the assessment. The court of claims granted summary disposition in favor of defendant.

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[1] Plaintiffs apparently asserted to its vendors that it was exempt from tax on its purchases of materials and fuel for use on the tugboats.

Plaintiff first argues that the UTA does not apply to its activities on the Great Lakes. We review questions of statutory interpretation de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005). Clear statutory language is enforced as written. *Id.*

"The use tax under the UTA complements the sales tax and is designed to cover those transactions not covered by Michigan's General Sales Tax Act [GSTA[2]]." *WPGP1, Inc v Dep't of Treasury*, 240 Mich App 414, 416; 612 NW2d 432 (2000). Section 3(1) of the UTA directs that "[t]here is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state." MCL 205.93(1). Plaintiff claims its use, storage, and consumption of personal property incident to its tugboat operation on the Great Lakes does not occur "in this state," as contemplated under the UTA. We disagree.

The reference to "this state" in MCL 205.93(1) plainly refers to Michigan. MCL 8.3o. Michigan's territorial jurisdiction has included portions of the Great Lakes since the state was admitted to the union. Act of June 15, 1836, ch 99, § 2, 5 Stat 49; Act of January 26, 1837, ch 6, 5 Stat 144; Const 1850, art 1; Const 1908, art 1; MCL 2.1, .201-.208.[3] MCL 205.93(1) was enacted in 1937. 1937 PA 94, § 3. The Legislature is presumed to be aware of existing law, *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 43; 576 NW2d 641 (1998), and thus was presumably and plainly aware that Michigan's territorial jurisdiction extended into the Great Lakes when enacting MCL 205.93(1). In directing that a use tax "shall be collected" related to the use, storage, or consumption of personal property "in this state," it is plain that the Legislature intended the tax to apply to these activities, to the extent they occurred in Michigan's territorial waters.

Plaintiff next argues that it is exempt from the use tax by virtue of MCL 205.94(1)(j). The primary goal of statutory interpretation is to ascertain and give effect to legislative intent. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). "If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning expressed." *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). However, "[t]ax exemptions are disfavored, and the burden of proving an entitlement to an exemption is on the party claiming the right to the exemption." *Guardian Industries Corp v Dep't of Treasury*, 243 Mich App 244, 249; 621 NW2d 450 (2000).

MCL 205.94(1)(j) establishes two types of exemptions with respect to vessels: (1) "[a] vessel designed for commercial use of registered tonnage of 500 tons or more, if produced upon special order of the purchaser"; and (2) "bunker and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500 tons or more engaged in interstate commerce." MCL 205.94(1)(j). Plaintiff argues it is entitled to avoid the use tax assessment under either of these exemptions. We disagree.

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[2] MCL 205.51 *et seq.*

[3] See also *Michigan v Wisconsin*, 272 US 398; 47 S Ct 114; 71 L Ed 315 (1926); *Detroit & Cleveland Navigation Co v Dep't of Revenue*, 342 Mich 234; 69 NW2d 832 (1955).

Plaintiff's use tax deficiency was the result of its failure to accrue use tax on materials used in repairs, fuel, and capital assets in the operation of its tugboats. Thus, the former exception is simply inapposite. Moreover, it is undisputed that plaintiff's tugboats all weigh less than 500 tons. Plaintiff argues that by attaching its tugboats to 500 ton vessels during the course of its operations, a qualifying "vessel" under MCL 205.94(1)(j) is effectively created. However, running a tow cable between plaintiff's tugboats and the boats they tow does not conjoin them, as they nevertheless remain independent vessels prior and subsequent to attachment. In fact, the language of MCL 205.94(1)(j) recognizes, implicitly if not explicitly, that a qualifying vessel is an independent, self-contained entity. The use of the indefinite article "a" before the term "vessel" denotes a single but unspecified member of the group "vessel." *The American Heritage Dictionary of the English Language* (1996). The term "vessel" is defined in relevant part as "a craft for traveling on water." *Random House Webster's College Dictionary* (1997). Therefore, the language of MCL 205.94(j) speaks of a single member of the group of watercraft that weighs 500 tons or more. To read the provision as plaintiff urges would require reading language into MCL 205.94(1)(j), thereby violating a fundamental canon of statutory interpretation. *In re Marin*, 198 Mich App 560, 564; 499 NW2d 400 (1993).[4]

Under the plain language of MCL 205.94(1)(j), plaintiff has also failed to sustain its burden of demonstrating its entitlement to the latter exemption. *Guardian Industries Corp*, *supra* at 249. Plaintiff argues that its use of the audited properties is exclusively for vessels of 500 tons or more engaged in interstate commerce. But this is belied by the evidence plaintiff presented concerning the nature of its operations. Plaintiff's tugboats acquire the repairs, fuel, and capital assets, and then use them to service plaintiff's clients. Even assuming that the audited properties service vessels of 500 tons or more, plaintiff nevertheless fails to qualify for the exemption because its use of the properties is not exclusive to those vessels. MCL 205.94(1)(j). Further, because running a tow cable between plaintiff's tugboats and the boats they tow does not result in the creation of a single vessel under the UTA, the use of the audited properties cannot be imputed to a single vessel.

Plaintiff next argues that the use tax as applied to it violates the Commerce Clause. Again, we disagree. The constitutionality of a tax under the Commerce Clause is a question of law we review de novo. See *Rayovac Corp v Dep't of Treasury*, 264 Mich App 441, 443-444; 691 NW2d 57 (2004). Statutes are presumed constitutional. *Phillips v Mirac, Inc*, 470 Mich 415, 442; 685 NW2d 174 (2004). "'The presumption of constitutionality is especially strong with respect to taxing statutes. . . . A taxing statute must be shown to clearly and palpably violate the fundamental law before it will be declared unconstitutional.'" *Fluor Enterprises, Inc v Dep't of Treasury*, 265 Mich App 711, 724; 697 NW2d 539 (2005) (citation omitted). The party challenging the constitutionality of the statute under the Commerce Clause bears the

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[4] Plaintiff cites a number of cases in support of its argument regarding the conjoining of vessels. One of the cases cited is *Foster v Davenport*, 63 US 244 (1 Howard); 16 L Ed 248 (1859). But the issue in *Foster* was whether a vessel engaged in lightering cargo from and towing vessels engaged in foreign commerce was itself engaged in foreign commerce. *Id.* at 245. Accordingly, *Foster* is inapplicable. The other cases involving tugboats cited by plaintiff are inapposite for the same reason.

burden of demonstrating its unconstitutionality. *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 670; 697 NW2d 180 (2005).

The United States Constitution grants Congress the power "[t]o regulate commerce with foreign nations, and among the several states." US Const, art I, § 8, cl 3. A negative command of the Commerce Clause—the dormant Commerce Clause doctrine—prohibits state regulation that discriminates against or unduly burdens interstate commerce. *Rayovac Corp, supra* at 443. A state tax is constitutional under this analysis "'provided that the tax: (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state.'" *Fluor Enterprises, supra* at 724 (citation omitted); see *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977).

Plaintiff argues that the substantial nexus prong is not met because plaintiff has no physical presence in Michigan. The record belies this argument. Plaintiff's tugboats enter and operate in or near various Michigan ports. Plaintiff's tugboats also operate and berth from Detroit and Sault Ste. Marie, and plaintiff classifies Detroit as a "home port" for some of its boats. By necessity, they operate within Michigan's territorial waters, which are plainly part of the State of Michigan. This is sufficient to establish plaintiff's physical presence in Michigan. See *Fluor Enterprises, supra* at 725; *Magnetek Controls, Inc v Dep't of Treasury*, 221 Mich App 400, 412; 562 NW2d 219 (1997).

The fair apportionment prong "requires that each state tax only its fair share of interstate business activity." *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 417-418; 488 NW2d 182 (1992) (citations omitted).[5] Whether a tax is fairly apportioned is determined by evaluating two "components of fairness," internal and external consistency. *Id.* Plaintiff concedes that the UTA is internally consistent, but argues that it is externally inconsistent. This argument fails because of the nature of Michigan's use tax. The UTA imposes a tax "for the privilege of using, storing, or consuming tangible personal property in this state." MCL 205.93(1). By definition, this taxes only that portion of plaintiff's activities reasonably reflecting the component of plaintiff's activities occurring within Michigan. *Gainey Transportation Service, Inc v Dep't of Treasury*, 209 Mich App 504, 509; 531 NW2d 774 (1995). The in-state activity triggering application of the use tax is plaintiff's actual use of personal property within Michigan. *Id.*

The UTA plainly does not discriminate against interstate commerce in violation of the third prong. The UTA and the GSTA are complementary taxation schemes, *WPGP1, Inc, supra* at 416, both imposing a six percent tax rate, MCL 205.52(1), .93(1). Because these rates are equal, the UTA does not discriminate against interstate commerce. *D H Holmes Co, Ltd v McNamara*, 486 US 24, 32; 108 S Ct 1619; 100 L Ed 2d 21 (1988); see also *Guardian Industries Corp, supra* at 259; *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 495; 516 NW2d 108 (1994).

[5] Superceded by statute on other grounds as stated in *Jefferson Smurfit Corp v Dep't of Treasury*, 248 Mich App 271; 639 NW2d 269 (2001).

Plaintiff argues that because its tugboats service vessels engaging in interstate commerce, its purchase of fuel and supplies cannot be taxed without discriminating against interstate commerce. This argument misapprehends the term "discrimination." "'Discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Westlake Transportation, Inc v Pub Service Comm*, 255 Mich App 589, 619-620; 662 NW2d 784 (2003). Regardless of whether plaintiff's tugboats service vessels engaging in intrastate or interstate commerce, the use tax applies. MCL 205.93(1). Plaintiff cannot avoid or mitigate the burden of the tax should it service only Michigan interests.

Finally, plaintiff has failed to sustain its burden of demonstrating that the use tax is not fairly related to services Michigan provides it. *Wheeler, supra* at 670. Requiring a relationship between the tax and the services provided by the taxing jurisdiction ensures "that a State's tax burden is not placed upon persons who do not benefit from the services provided by the State." *Goldberg v Sweet*, 488 US 252, 266-267; 109 S Ct 582; 102 L Ed 2d 607 (1989). Plaintiff's tugboats enter and operate in or near various Michigan ports. They provide "docking and undocking" and "interport towing" services to vessels to and from these ports. They also berth from Detroit and Sault Ste. Marie, and plaintiff classifies Detroit as a "home port" for some of its boats. Contrary to plaintiff's claims, its operation is not limited solely to Michigan waters. Plaintiff's use of Michigan port facilities affords it "not only police and fire protection, but also the benefits of a trained work force and the advantages of a civilized society." *Japan Line, Ltd v Los Angeles Co*, 441 US 434, 445; 99 S Ct 1813; 60 L Ed 2d 336 (1979).

Therefore, we reject plaintiff's argument that the court of claims erred in granting defendant summary disposition under MCR 2.116(I)(2). MCR 2.116(I)(2) provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." As discussed above, defendant was entitled to summary disposition on plaintiff's claims under MCL 205.93(1), MCL 205.94(1)(j), and the Commerce Clause. The court of claims therefore properly exercised its discretion to grant defendant summary disposition under MCR 2.116(I)(2). See *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 657-658; 651 NW2d 458 (2002).

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens